U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HOWARD E. LYNCH and U.S. POSTAL SERVICE,
TRIBORO DISTRICT, Jamaica, NY

Docket No. 01-1982; Submitted on the Record;
Issued April 1, 2002

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant sustained a stroke or hypertension as a result of emotional stress sustained during the performance of duty on February 22, 2000; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration.

On March 27, 2000 appellant, then a 55-year-old custodian/laborer, filed a traumatic injury claim alleging that on February 22, 2000 due to the unprofessional conduct of his supervisor during a conversation, he suffered from emotional stress and hypertension which was followed by a stroke.

In a statement dated March 7, 2000, appellant's supervisor stated that he had been approached by the Tool and Parts clerk who indicated that the stockroom was not being cleaned and that when he went to find appellant to discuss this matter, he found him sitting in a corner sleeping. At that point, appellant and his supervisor had a discussion in which his supervisor indicated that he was concerned about appellant's job performance. The supervisor stated that he told appellant, *inter alia*, that the stockroom was not being properly cleaned in that there was debris on top of the cabinets the floor needed sweeping and the bathroom looked as if it had not been mopped. The supervisor indicated that he spoke in a normal tone and that appellant did not, at that time, state that he felt upset or sick. In another statement, the supervisor indicated that other employees told him that the week prior to the incident appellant complained of having pains in his arm and side.

By letters dated June 23, 2000, the Office requested further information from appellant. Appellant submitted a statement by Tom Kelly, who indicated that on February 22, 2000 at approximately 7:30 a.m., appellant came into the break room after he had a discussion with his supervisor and mentioned that his left hand was numb and that he felt funny.

On August 4, 2000 the Office received a written response to the June 23, 2000 letter. Appellant indicated that, contrary to the supervisor's allegations, he was not asleep when

confronted by the supervisor and that none of the maintenance people ever dusted the cabinets in the stockroom. He admitted that the supervisor did not raise his voice, but indicated that this conversation upset him. He denied making complaints about pains in his arm or side to other workers. Appellant attached an insurance claim form wherein a physician, whose signature is illegible, indicated that appellant suffered from a cerebral vascular accident (stroke) on February 22, 2000. He also attached a September 14, 1998 medical report wherein Dr. Harold K. Sirota, an osteopath, indicated that appellant had been under his care since 1994 for hypertension and diabetes, that appellant advised him that he had been switched to a night schedule at work and that he thought it was in appellant's best interests for monitoring his mediation that he maintained a day schedule.

By decision dated November 4, 2000, the Office denied appellant's claim, finding that appellant's allegation that his supervisor engaged in unprofessional conduct was not compensable as there was no indication that his supervisor acted unreasonably in the discussion of February 22, 2000.

On April 23, 2001 appellant filed a request for reconsideration. Appellant presented legal arguments and submitted evidence that was already considered by the Office. In addition, appellant submitted a medical report from Dr. Sirota, who indicated that appellant had been a patient since 1994 and came to his office on February 22, 2000 complaining of numbness to the outer aspect of his left hand and left side of his face. Appellant returned to Dr. Sirota's office the following day complaining of symptoms of weakness. An ambulance was called to transport appellant to the hospital and a computerized tomography scan was performed on appellant, which indicated a right-sided cerebral vascular accident. Dr. Sirota indicated that the work incidents of February 22, 2000 could have definitely impacted appellant's health. He concluded that "based upon the information provided that the incident at work was the proximate cause of his condition."

By decision dated May 21, 2001, the Office found that the evidence submitted with the reconsideration request was insufficient to warrant a merit review.

The Board finds that appellant has failed to establish that his stroke or hypertension sustained on or about February 22, 2000 was sustained as a result of emotional stress causally related to compensable factors of his federal employment.

To establish appellant's claim that he sustained an emotional condition in the performance of duty, appellant must submit the following: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to his condition; (2) rationalized medical evidence establishing that he has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.[1]

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within the concept of

[1] *See Dona Faye Cardwell*, 41 ECAB 730 (1990).

workers' compensation. These injuries occur in the course of employment and have some kind of causal connection with it but are not covered because they do not arise out of the employment. Distinctions exist as to the type of situations giving rise to an emotional condition which will be covered under the Federal Employees' Compensation Act. Generally speaking, when an employee experiences an emotional reaction to his or her regular or specially assigned employment duties or to a requirement imposed by his or her employment or has fear or anxiety regarding his or her ability to carry out assigned duties and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is regarded as due to an injury arising out of and in the course of the employment and comes within the coverage of the Act.[2] Conversely, if the employee's emotional reaction stems from employment matters which are not related to his or her regular or assigned work duties, the disability is not regarded as having arisen out of and in the course of employment and does not come within the coverage of the Act.[3] Noncompensable factors of employment include administrative and personnel actions, which are matters not considered to be "in the performance of duty."[4]

In *Thomas D. McEuen*,[5] the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under the Act as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. The Board noted, however, that coverage under the Act would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant.[6] Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated

Appellant's reaction to his supervisor's discussion about his work performance is a self-generated response to an administrative action, which absent evidence of error or abuse, is not compensable. The incident on February 22, 2000 involved a situation where the supervisor was discussing with appellant problems with his job performance. There is no indication that the supervisor acted abusively. Appellant acknowledged that the supervisor did not raise his voice. Appellant's statement that this was abuse as he was not sleeping and that he did the cleaning properly, without further proof, does not establish abuse and is not sufficient to establish compensability under the Act. Therefore, appellant has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.[7]

[2] 5 U.S.C. § 8124(b)(1).

[3] *Id.*

[4] *See Joseph Dedenato*, 39 ECAB 1260 (1988); *Ralph O. Webster*, 38 ECAB 521 (1987).

[5] 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

[6] *See Richard J. Dube*, 42 ECAB 916 (1991).

[7] As appellant has failed to allege a compensable factor of employment substantiated by the record, the medical evidence need not be addressed. *See Margaret S. Kryzycki*, 43 ECAB 496 (1992).

The Board further finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may--
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> (1) end, decrease or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."[8]

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).

The Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[9] When an application for review of the merits of the claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.[10]

The reason appellant's claim was denied was that he had not established a compensable factor of employment. The only new evidence submitted by appellant on reconsideration, *i.e.*, an undated report by Dr. Sirota, does not provide persuasive evidence on this issue, as it is irrelevant to the issue of whether appellant established a compensable factor of employment in the performance of duty. Appellant's statement on reconsideration is duplicative of arguments already considered by the Office. Material which is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.[11] Accordingly, the Office did not abuse its discretion in denying merit review.

[8] 5 U.S.C. § 8128(a).

[9] 20 C.F.R. § 10.606(b)(2) (1999).

[10] 20 C.F.R. § 10.608(b) (1999).

[11] *See Kenneth R. Mroczkowski*, 40 ECAB 855, 858 (1989); *Marta Z. DeGuzman*, 35 ECAB 309 (1983); *Katherine A. Williamson*, 33 ECAB 1696, 1705 (1982).

The May 21, 2001 and November 4, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
April 1, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member